A

TENGKU DATO' IBRAHIM PETRA TENGKU INDRA PETRA & ORS v. PERDANA PETROLEUM BHD

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN J
[ORIGINATING SUMMONS NO: WA-24NCC-391-08-2018]
29 MAY 2019

B

COMPANY LAW: *Directors – Indemnity – Claim for indemnity of costs incurred in defending suits – Whether article of association of company provided for claim for indemnity – Whether directors could rely on article of association – Whether directors ought to have sought order for costs on indemnity basis from courts – Whether claim could be made in separate proceedings – Whether directors within statutory right to obtain indemnity – Companies Act 2016, s. 289*

C

On 21 December 2009, Shamsul Saad ('Shamsul'), a minority shareholder of the company, filed a derivative action in the Kuala Lumpur High Court ('suit 735') against, *inter alia*, the present plaintiffs, who were, at the time, in control of the company. When the present plaintiffs were removed as directors of the company at an extraordinary general meeting and hence, ceased to be directors of the company and no longer in control of the company, the substratum of the derivative action was no longer prevalent. Pursuant to an application by the present plaintiffs under O. 14A of the Rules of the High Court 1980, suit 735 was struck out and dismissed. On 22 June 2011, the company commenced suit 1057 against P1, P3 and P4 for, *inter alia*, breaches of directors' duties, obligations of trust as directors, and conspiracy to injure the company. Consequent to the decision in suit 735, the present plaintiffs filed an originating summons ('OS73') against the company for an indemnity of the costs incurred in the sum of RM304,500 for defending suit 735. However, OS73 was dismissed, not on its merit but rather, on the ground of failure of substratum and that the present plaintiffs had not yet been vindicated. The High Court also dismissed the company's claim against P1, P3 and P4 in suit 1057 on 21 March 2014. However, P1 was found to be negligent and breached his director's duty and was ordered to refund a sum of RM192,780 to the company. The company's appeal against the decision was allowed by the Court of Appeal on 25 August 2015 and the High Court's judgment in suit 1057 was set aside. Thereupon, P1, P3 and P4 applied for leave to appeal to the Federal Court. On 14 December 2017, the Federal Court allowed the appeals and the High Court's judgment in suit 1057 was reinstated. In light of the fact that P1, P3 and P4 were exonerated, vindicated and cleared of all wrongdoings by the High Court and finally by the Federal Court, the plaintiffs filed the present originating summons ('OS391') pursuant to s. 289(3)(a) and (b), (4)(a), (b) and (c) of the Companies Act 2016 ('CA 2016'), as well as article 170 of the

D

E

F

G

H

I

Memorandum and Articles of Association of the company ('article 170'), to indemnify themselves for the legal costs which were incurred in successfully defending suit 735 and suit 1057 and the appeals arising therefrom.

Held (allowing plaintiff's claim):

(1) Article 170 was not confined to a claim for indemnity by a director for successfully defending himself against a suit brought by a third party. The language of article 170 was sufficiently wide enough to encompass within its scope, a claim for indemnity for proceedings by the company against the director. The right to an indemnity under article 170 existed at the material time when OS73 was heard but the claim was considered premature at that time as suit 735 was not dismissed on merits but rather on *locus standi*. By virtue of having been appointed as directors *via* the articles of association, it followed that article 170 was necessarily incorporated into the present plaintiffs' contractual relationship with the company. The present plaintiffs may therefore rely on article 170 to claim indemnity for costs incurred by them in defending suit 735 and suit 1057. (paras 75, 76 & 78)

(2) The failure on the part of the present plaintiffs to previously seek an order for costs on an indemnity basis from the respective courts was not fatal. The claim for costs indemnification could and should, for all practical reasons, be made subsequently in separate proceedings for these purposes so that there could be proper argument and mature consideration on the multifarious issues that could arise. Hence, this was the proper forum for the present plaintiffs to make the claim for indemnity under article 170. (paras 81 & 82)

(3) Article 170 is very wide and the present plaintiffs as former directors of the company may claim an indemnity for legal costs/expenses for successfully defending themselves in any proceedings including an action by the company against its own directors for breach of trust/breach of duty as a director. There was certainly a causal connection between the conduct of the present plaintiffs and their duties towards the company which brought the litigation within the frame of article 170 which was unambiguous and clear in its intention – that directors who are sued for any breach of their duties towards the company may later look to the company for indemnity and reimbursement of all legal expenses incurred in successfully defending themselves and being vindicated of all the nefarious allegations that were levelled against them. That was the severe financial risk that the company took when it launched the litigation against the present plaintiffs *via* the legal actions against the present plaintiffs. (paras 93 & 95)

(4) The earliest point in time that the present plaintiffs could have filed an action for indemnity was 31 January 2017 – when the CA 2016 came into force and not at any earlier date. On 31 January 2017, there was

no judgment vindicating the plaintiffs of the alleged wrongdoings as the Court of Appeal had on 25 August 2015 set aside the High Court Order dated 21 March 2014 which previously vindicated the present plaintiffs. By not accepting the correctness of the decision of the High Court, the company had kept the issue of vindication alive and extant and this was the position until the decision of the Federal Court on 14 December 2017. By that time, s. 289 of the CA had come into force and gave them a statutory right to obtain an indemnity in respect of their legal costs incurred throughout the litigation proceedings. The claim here was filed on 7 August 2018, which was well after the coming into force of the CA 2016. (paras 96, 97 & 99)

Case(s) referred to:

Anglo-Austrian Printing and Publishing Union (Re Isaac's Case)[1892] 2 Ch 158 ***(refd)***
Chee Kheong Mah Chaly v. Liquidators of Baring Futures (Singapore) Pte Ltd [2003] SGCA 28; [2003] 2 SLK 571 ***(refd)***
Christchurch City Council v. Davidson [1997] 1 NZLR 275 ***(refd)***
Cotman v. Brougham [1918] AC 514 ***(refd)***
Eastern Shipping Co v. Quah Beng Kee [1924] AC 177 ***(refd)***
Fay v. Moramba Services Pty Ltd [2010] NSWSC 725 ***(refd)***
Globalink Telecommunications Ltd v. Wilmbury Ltd And Others [2002] EWHC 1988 QBD ***(refd)***
In re Famatina Development Corporation Limited [1914] 2 Ch 271 ***(refd)***
John v. Price Waterhouse [2001] 1 WLR 953 ***(refd)***
Kenderaan Bas Mara v. Yew Bon Tew & Anor [1979] 1 LNS 38 FC ***(refd)***
Malayan Banking Ltd v. Raffles Hotel Ltd [1965] 1 LNS 107 FC ***(refd)***
Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors [2014] 1 LNS 236 HC ***(refd)***
Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors [2015] 8 CLJ 856 CA ***(refd)***
Re Famatina Development Corporation, Limited [1914] 2 Ch 27 CA ***(refd)***
Rowland v. Gulfpac Ltd; Lnoco Pie And Others v. Gulf USA Corporation And Others [1995] Lexis Citation 1631 ***(refd)***
Shamsul Saad v. Tengku Dato' Ibrahim Petra Tunku Indra Petra & Ors [2010] 1 LNS 959 HC ***(refd)***
Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal [2018] 2 CLJ 641 FC ***(refd)***
Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors v. Perdana Petroleum Bhd [2013] 4 CLJ 600 HC ***(refd)***
Tomlinson v. Liquidators of Scottish Amalgamated Silks, Limited [1935] SC (HL) 1 ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), s. 140(1), (2)
Companies Act 2016, ss. 287, 288, 289(3)(a), (b), (4)(a), (b), (c), 619(3), 620(4)
Interpretation Acts 1948 and 1967, s. 17A
Rules of Court 2012, O. 59 r. 1
Rules of the Court of Appeal 1994, r. 55
Rules of the Federal Court 1995, r. 85
Rules of the High Court 1980, O. 14A

Companies Act 1985 [UK], s. 310(3)

For the plaintiffs - Alex De Silva, James Khong & Quek Yiing Huey; M/s Bodipalar Ponnudurai De Silva
For the defendant - Malik lmtiaz, Murali Sangaran & Khoo Suk Chyi; M/s Murali Sangaran

Reported by S Barathi

JUDGMENT

S Nantha Balan J:

Introduction

[1] This is an originating summons dated 7 August 2018 which is registered as OS24NCC-391-08-2018 ("OS391"). The plaintiffs in OS391 are former directors of Perdana Petroleum Berhad (formerly known as Petra Perdana Berhad) ("the company"). The plaintiffs in OS391 shall be referred to collectively as "the present plaintiffs". And, where necessary, I shall refer to the present plaintiffs individually as first plaintiff ("P1"), second plaintiff ("P2"), third plaintiff ("P3") and fourth plaintiff ("P4") respectively.

[2] OS391 is predicated on s. 289(3)(a) and (b), (4)(a), (b) and (c) of the Companies Act 2016 ("CA 2016") and article 170 of the memorandum and articles of association of the company for an order of indemnity in respect of all legal costs and expenses incurred by the present plaintiffs in defending legal actions which had been previously taken against them, for purported breaches of directors' duties, breach of obligation of trusts and conspiracy to injure. The present plaintiffs ceased to be directors of the company with effect from 4 February 2010. They were embroiled in various legal actions with respect to the discharge of duties as directors of the company. In the previous legal actions against them, it was alleged that they were in breach of their duties as directors of the company and were in breach of their obligations of trust as directors, and that they were involved in a conspiracy to injure the company.

[3] For the purpose of OS391, it will not be necessary to discuss these allegations in detail as they merely form an important and integral part of the background facts. Hence, it would suffice to refer to the allegations collectively as "the allegations". The springboard for the allegations is the company's divestment of a block of controlling shares in Petra Energy Berhad ("PEB").

The High Court Judgment - The Allegations

[4] The main legal action which was predicated on the allegations was a civil suit namely Kuala Lumpur High Court suit No. D-22NCC-1057-2011 ("suit 1057") which proceeded to full trial. However, suit 1057 was not the first legal action which arose out of the allegations. In suit 1057 the parties who were named as defendants were, *inter alia*, P1, P3, P4 and one Robert Lee. Robert Lee was at all material times an executive director of PEB. P2

was a defendant in earlier legal proceedings but she was not named as a co-defendant in suit 1057. The narrative of the events and gravamen of the allegations against P1, P3 and P4 in suit 1057 may be readily gathered from the following paragraphs of the judgment of the trial judge, Justice Nallini (now FCJ), which is reported as *Petra Perdana Berhad v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2014] 1 LNS 236; [2014] 11 MLJ 1; [2014] 4 AMR 658 HC:

> [1] The plaintiff is a public limited company whose shares are traded on Bursa Malaysia. The first to third the defendants are the previous directors of the plaintiff. At one time, Petra Energy Bhd ('PEB'), another public listed company, was a subsidiary of the plaintiff.
>
> [2] The litigation here arose as a consequence of the divestment of a substantial portion of the shareholding of PEB in 2009, by the then directors of the plaintiff, particularly the first to third defendants. The first and third defendants were also directors of PEB. The fourth defendant was at all material times an executive director of PEB.
>
> [3] It is the plaintiff's case that through a series of systematic acts and omissions on the part of the previous directors, more particularly the first to third defendants, the plaintiff's shares in Petra Energy Bhd were methodically disposed of, through two particular divestments. The fourth defendant is alleged to have assisted or facilitated these divestments. As a consequence of these divestments, the plaintiff complains that it lost its controlling block of shares in PEB, which it considered its 'jewel in the crown'. PEB ceased to be a subsidiary of the plaintiff.
>
> [4] The plaintiff further complains that all the shares so divested ended up in the hands of one Shorefield Resources Sdn Bhd, who in turn became the single largest shareholder in PEB.
>
> [5] Subsequent to the impugned divestments, an extraordinary general meeting of the plaintiff was convened and held, where the first to third defendants were removed as directors. A new board was reconstituted. The plaintiff then took issue with these divestments by instituting, *inter alia*, this suit.
>
> [6] The plaintiff's pleaded case, in summary is that the first to third defendants:
>
> (a) acted in breach of their fiduciary and statutory duties as directors of the plaintiff;
>
> (b) breached their duty of care and trust obligations as directors of the plaintiff; and
>
> (c) conspired either lawfully or unlawfully with other persons, including the fourth defendant, to injure the plaintiff by divesting of its shares in PEB, which divestments were to the detriment of the plaintiff.
>
> [7] The defence of the first to third defendants is that they did, in authorising and effecting the two impugned divestments of shares in PEB, act at all material times pursuant to the mandates of the board of directors collectively arrived at in August and November 2009. They maintain that

they did, at all times act *bona fide* in the interests of the plaintiff when effecting such divestments which were duly authorised by the board. In essence they point to the fact that the dominant purpose of such divestments was to meet the urgent liquidity needs of the plaintiff and to assuage its dire cash flow position because:

(a) the plaintiff was at the time in a tight liquidity position;

(b) there was threatened litigation by creditors, particularly one Shin Yang Shipyard;

(c) the plaintiff had, for the first time in its corporate history, made a loss of approximately RM8.9m in the third quarter of 2009; and

(d) the plaintiff was unable to obtain funds expeditiously through other means.

[8] As such the first to third defendants maintain that they duly discharged their fiduciary and statutory duties as directors of the plaintiff with regards to these disputed divestments. They point to the fact that they relied on professional advisors in carrying out these transactions.

[9] As for the plea of conspiracy, the first to third and fourth defendants deny the same absolutely, maintaining that there was never at any point of time any agreement arrived at between them and/or others to injure the plaintiff. They deny the existence of any scheme designed to injure the plaintiff by causing the divestment of its 'crown jewel', namely PEB.

[10] It is immediately apparent from the summation of the bare facts of this dispute that the core issues before this court turn on whether the first to third directors:

(a) breached their fiduciary or statutory duties as directors; or

(b) acted in breach of the duty of care they owed (as directors) to the plaintiff in tort; or

(c) acted in breach of their obligations of trust as directors of the plaintiff; and finally

(d) conspired, *albeit* lawfully or unlawfully to injure the plaintiff by deliberately causing it to lose its prized subsidiary.

(Limb (a) encompasses both the common law and statutory duties owed by the directors to the plaintiff).

Vindication Of P1, P3 And P4

[5] Justice Nallini vindicated and cleared, *inter alia*, P1, P3 and P4 of all the alleged wrongdoings as directors of the company. The claim against Robert Lee was also dismissed. She said:

[489] I therefore conclude that the plaintiff's claim against the four defendants, namely Tengku Ibrahim, Lawrence Wong, Tiong and Robert Lee fails. In this context I find that:

A (a) Tengku Ibrahim who was then the executive chairman and/or director of the plaintiff acted properly in effecting the second and third divestments. There was no breach of his fiduciary, statutory or common law duties. He was not negligent in effecting these divestments;

B (b) Tengku Ibrahim was properly conferred with the power to dispose of PEB's shares under the second divestment by reason of the mandate accorded to him by the board of directors of the plaintiff on 26 August 2009;

C (c) the rationale for the second divestment, namely the need to meet the cash flow or liquidity problems of the plaintiff, coupled with the demand from Shin Yang Shipyard for payment of the balance purchase price due for the vessel known as Petra Galaxy due to be delivered urgently to Shell to fulfil a contract valued at RM1.1 billion were all genuine concerns and were not 'contrived' reasons as suggested by the plaintiff. In other words these matters were not fabricated or put up by the impugned directors with a view to facilitating the sale of the PEB shares to Shorefield Resources Sdn Bhd and causing injury to the plaintiff;

D (d) in view of the urgency of the liquidity problem Tengku Ibrahim was justified in selling the shares under the second divestment at the depressed price of RM1.53;

E (e) as such Tengku Ibrahim, Lawrence Wong and Tiong exercised their powers as directors *bona fide* in the best interest of the plaintiff. None of these directors exercised their powers for an improper purpose or with ulterior motives;

F (f) there is no evidence of personal gain by any of the impugned directors. Neither is there any evidence explaining why they would wish to inflict 'injury' on the plaintiff;

G (g) given the complexity of the circumstances prevailing at the time, the impugned directors, particularly Tengku Ibrahim exercised due care and diligence in effecting the second and third divestments. In this regard it is pertinent that the board of directors offered no other alternative to the liquidity problems faced by the plaintiff apart from the sale of the PEB shares;

H (h) the decision to undertake the second divestment was a business judgment made by Tengku Ibrahim, Lawrence Wong and Tiong. In making the judgment they relied on representations made by Soon Fook Kian. They did not err in relying on him;

I (i) if my conclusions above are incorrect and it is concluded that these impugned directors did breach their duties *albeit* statutory, common law or fiduciary, then the fact that they acted honestly and in good faith warrants the invocation of s. 354 of the Companies Act 1965;

(j) with respect to the third divestment, it is the finding of this court that none of the three impugned directors acted in breach of their duties.

This is because they were advised by Soon Fook Kian and Shamsul Saad that the cash flow problem for the following twelve months, ie 2010 would deteriorate and that the plaintiff would face serious liquidity problems;

(k) the board of directors of the plaintiff including the three impugned directors collectively considered all other options and dismissed them after deliberation, concluding that the sale of the entirety of the plaintiffs PEB shares was the only means of resolving the cash flow problem which was exacerbated by the fact that the plaintiff had suffered its first loss in corporate history for that particular quarter.

Hence Tengku Ibrahim was given a conditional mandate to sell the entirety of the PEB shares;

(l) Tengku Ibrahim was unable to comply in full with the conditional mandate accorded by the board. However in effecting the third divestment he was at all times advised by, and therefore entitled to rely on the advice of professional advisors. The mode of sale of the PEB shares under the third divestment was ratified by the board of directors at their meeting on 22 December 2009;

(m) the disposal price of the shares under the third divestment was higher than the mandated price of RM1.80 and the market price. It fell within the valuation range of the fairness consideration report procured by Tengku prior to effecting the sale. As a consequence the plaintiff made a gain from the third divestment. There was no personal gain to any of the three directors or Robert Lee as a consequence of the third divestment;

(n) the three directors did not act for an improper purpose in exercising their power to give effect to the third divestment;

(o) in effecting the third divestment, Tengku Ibrahim made a business judgment and was entitled to rely on the advice of professionals such as Affin Investment Bank and TA Securities Holdings Bhd.

(p) even if there were any technical breaches, the entirety of the factual matrix surrounding these divestments warrant invoking s. 354 of the Companies Act 1965.

(q) the allegation of conspiracy fails because there is insufficient evidence to establish this cause of action, *albeit* lawful means or unlawful means conspiracy. Intention and damage are key elements that have not been established. On the contrary in light of the court's finding that Tengku Ibrahim, Lawrence Wong and Tiong acted in the best interest of the plaintiff, this cause of action must fail. The two contentions are mutually exclusive; and

(r) the evidence establishes at best that Tengku Ibrahim was aware that the most likely potential purchaser for the PEB shares was going to be Shorefield Resources Sdn Bhd This fact, taken and considered cumulatively within the chronology of events both prior to and after

A the divestments, do not form the basis for a cause of action in conspiracy. Instead the evidence taken as a whole establishes that the primary reason for the divestments was to protect the interests of the company, rather than endanger it.

[490] The plaintiff has therefore failed to prove its claim. The plaintiff's B claim is therefore dismissed in its entirety save for one exception.

[491] The one exception is the appointment of fiduciary limited to sell the shares falling within the purview of the second divestment. I have earlier concluded that Tengku Ibrahim alone was negligent or breached his duty of care in appointing a placement agent or broker that was unlicensed under the CMSA. Accordingly it is ordered that Tengku Ibrahim pay the C sum of RM192,780 being the costs of appointment of Fiduciary Ltd to the plaintiff.

[492] The costs of this action are to be borne by the plaintiff. Such costs will be quantified after hearing submissions from counsel.

D **The Appeals - The Court Of Appeal And The Federal Court**

[6] The company appealed to the Court of Appeal. The Court of Appeal allowed the company's appeal and the decision of the High Court was set aside (see: *Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2015] 8 CLJ 856 CA). P1, P3 and P4 took the matter further to the E Federal Court. The legal proceedings reached finality when the Federal Court allowed the appeals by P1, P3 and P4 whereby the decision of the High Court was reinstated.

[7] The judgment of the Federal Court is reported as *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ F 641; [2018] 1 AMR 517; [2018] 2 MLJ 177 FC). During the course of these legal proceedings, various orders of costs (on a party and party basis) were made by the courts against the unsuccessful parties. All the costs that were ordered have since been paid by the company to the present plaintiffs. In light of the fact that P1, P3 and P4 were exonerated, vindicated and cleared G of all wrongdoings by the High Court and finally by the Federal Court, the present plaintiffs now seek an indemnity from the company for all legal costs and expenses (less party and party costs which have been paid) that they had incurred in successfully defending themselves in the legal proceedings which had been filed against them (inclusive of suit 1057).

H **[8]** The present plaintiffs seek the following orders by way of OS391:

1. A declaration that the plaintiffs are entitled to be indemnified out of the assets of the Company against legal costs in the sum of RM304,500.00 or such other sum as incurred jointly by them in the derivative action brought in the interest of the Company against them as previous directors I of the Company in Kuala Lumpur High Court Civil Suit No. D-22NCC-735-2009.

2. Consequent to prayer (1) above, an order that:-

2.1 the sum of RM304,500.00 be paid by the Company to the plaintiffs within seven (7) days from the date of this Order;

2.2 in the alternative, an assessment and/or determination of such legal costs be conducted by this Honourable Court and that such assessed or determined sum be paid by the Company to the plaintiffs within seven (7) days from the date of this Order.

3. A declaration that the first , 3rd and fourth plaintiffs are entitled to be indemnified out of the assets of the Company against legal costs as incurred jointly by them in relation to:

3.1. the Company's action brought against them as previous directors of the Company in Kuala Lumpur High Court Civil Suit No. D-22NCC-1057-2011;

3.2. the Company's appeal in the Court of Appeal Civil Appeal No. W-02(NCC)(W)-736-04/2014;

3.3. the first plaintiff's application for leave to appeal in the Federal Court Civil Application No. 08-446-09/2015;

3.4. the 3rd and fourth plaintiffs' application for leave to appeal in the Federal Court Civil Application No. 08-443-09/2015;

3.5. the first plaintiff's appeal in the Federal Court Civil Appeal No. 02(f)-7-03/2016(W); and

3.6. the third and fourth plaintiffs' appeal in the Federal Court Civil Appeal No. 02(f)-8-03/2016(W).

4. Consequent to prayer (3) above, an order that:

4.1. the sum of RM1,446,189.06 be paid by the Company to the first plaintiff within seven (7) days from the date of this Order;

4.2. the sum of RM565,973.60 be paid by the Company to the third and fourth plaintiffs within seven (7) days from the date of this Order;

4.3. in the alternative, an assessment and/or determination of such legal costs be conducted by this Honourable Court and that such assessed or determined sum be paid by the Company to the plaintiffs within seven (7) days from the date of this Order.

5. Costs of this application and/or all such other ancillary costs arising herein be borne by the Company on a solicitor-client basis;

6. Such further and/or other consequential relief as this Honourable Court deems fit and just.

The Litigation History - Background Facts

[9] On 21 December 2009, Shamsul bin Saad ("Shamsul"), as a minority shareholder of the company, filed a derivative action in the Kuala Lumpur High Court *via* Civil Suit No. D-22NCC-735- 2009 ("suit 735") against, *inter alia*, the present plaintiffs. The present plaintiffs were at the time in control

of the company. As such, the company could not of itself sue the present plaintiffs for wrongdoings committed in their capacity as directors of the company at that time. In suit 735 which was filed on or about 21 December 2009, Shamsul sought the following orders against the present plaintiffs:

(i) an order declaring that (the present plaintiffs), being the directors of the (company), had breached their duty of care, and their statutory and fiduciary duties owed to the (company);

(ii) an order declaring that by the disposal of 10,500,000 shares in Petra Energy Berhad by *inter alia* the (present plaintiffs) on 11 September 2009, the (present plaintiffs) had breached the general mandate of the company's shareholders dated 25 April 2007 which was renewed on 25 June 2009;

(iii) an order declaring that the disposal of 48,800,000 shares in Petra Energy Berhad *inter alia* by the (present plaintiffs) on 11 December 2009 had breached the decision of the (company's) board of directors;

(iv) damages to be paid to the (company).

[10] However, the situation changed on 4 February 2010 as the present plaintiffs were removed as directors of the company at an Extraordinary General Meeting ("EGM"). Hence, with effect from 4 February 2010, the present plaintiffs ceased to be directors of the company. Accordingly, the substratum of the derivative action was no longer prevalent as the alleged wrongdoers were no longer in control of the company. From that date onwards, the company was able to sue the present plaintiffs in its own name rather than *via* a derivative action. What happened next is that pursuant to an application by the present plaintiffs under O. 14A of the Rules of the High Court 1980, suit 735 was struck out and dismissed on 16 August 2010 (see: *Shamsul Saad v. Tengku Dato' Ibrahim Petra Tunku Indra Petra & Ors* [2010] 1 LNS 959 HC - per Justice Hamid Sultan Abu Backer where the learned judge held at para. 4(e) of his judgment that "the substratum to continue with a derivative action has collapsed").

[11] On 22 February 2012, the present plaintiffs filed Kuala Lumpur High Court Originating Summons No. D-24NCC-73-02/2012 ("OS73") for an indemnity of the costs incurred in the sum of RM304,500 for defending suit 735. On 6 September 2012, OS73 was dismissed by Justice Mohamad Ariff Md Yusof ("Justice Ariff"). The learned judge opined that suit 735 was not dismissed on merits but rather on the ground of failure of substratum and that the present plaintiffs **had not yet been vindicated** (see: *Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors v. Perdana Petroleum Bhd* [2013] 4 CLJ 600; [2013] 8 MLJ 280).

[12] On 22 June 2011, the company commenced suit 1057 against P1, P3, and P4 for, *inter alia*, breaches of directors' duties, obligations of trust as directors, and conspiracy to injure the company. The company sought to

obtain an order declaring that the divestment by the company of 10,500,000 shares in PEB to TA First Credit Sdn Bhd was not *bona fide* and/or in the interest of the company and/or is a sham; that P1, P3 and P4 are to pay damages suffered by the company.

[13] After a full trial, the High Court (per Justice Nallini) dismissed the claim against P1, P3 and P4 on 21 March 2014. However, the High Court found that P1 was negligent and had breached his director's duty by appointing an unlicensed placement agent or broker, and ordered P1 to refund a sum of RM192,780 to the company (see: *Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2014] 1 LNS 236; [2014] 11 MLJ 1; [2014] 4 AMR 658 HC). P1 has paid the sum of RM192,800 to the company. The company appealed to the Court of Appeal.

[14] On 25 August 2015, the Court of Appeal allowed the appeal and set aside the High Court's judgment in suit 1057 (see: *Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2015] 8 CLJ 856 CA). Thereupon, P1, P3 and P4 applied for leave to appeal to the Federal Court. Leave was granted and two appeals were filed, namely Federal Court Civil Appeal No. 02(F)-7-03/2016(W) and 02(F)-8-03/2016(W) ("Federal Court appeals"). On 14 December 2017, the Federal Court appeals were allowed and the High Court's judgment in suit 1057 was reinstated (see: *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641; [2018] 1 AMR 517; [2018] 2 MLJ 177 FC).

Indemnity - OS391

[15] On 7 August 2018, the plaintiffs filed OS391 pursuant to s. 289(3)(a) and (b), (4)(a), (b) and (c) of CA 2016, as well as article 170 of the memorandum and articles of association of the company, to indemnify themselves for the legal costs which were incurred in successfully defending suit 735 and suit 1057 and the appeals arising therefrom.

Chronology

[16] For convenience, the litigation between the parties is set out in the following table:

DATE	EVENT
21.12.2009	Shamsul bin Saad ("Shamsul"), as a minority shareholder of Petra Perdana Berhad ("the company"), filed a derivative action in Kuala Lumpur High Court Civil Suit No. D-22NCC-735-2009 ("suit 735") against, *inter alia*, the present Plaintiffs.
16.8.2010	Kuala Lumpur High Court ("KLHC") dismissed suit 735 pursuant to an interlocutory application made by the present plaintiffs pursuant to Order 14A of the Rules of the High Court 1980. Costs of RM10,000.00 was ordered to be paid by the company to the present plaintiffs (see: [2010] 1 LNS 959

A	22.6.2011	The company commenced Kuala Lumpur Civil Suit No. D-22NCC-1057-2011 ("suit 1057") against the first, third, and fourth plaintiffs for, *inter alia*, breaches of directors' duties, obligations of trust as directors, and conspiracy to injure the company.
B	22.2.2012	Consequent to the decision in suit 735, the plaintiffs commenced Kuala Lumpur High Court Originating Summons No. D-24NCC-73-02/2012 ("OS73") against the company for an indemnity of the costs incurred in the sum of RM304,500.00 for defending suit 735.
C	6.9.2012	KLHC dismissed OS73 on the basis that suit 735 was dismissed on the ground of failure of substratum. The plaintiffs had not been held innocent of the allegations, nor vindicated. Costs of RM15,000.00 was ordered to be paid by the plaintiffs to the company (see: [2013] 4 CLJ 600; [2013] 8 MLJ 280;).
D	21.3.2014	The KLHC dismissed suit 1057 save that the first plaintiff was negligent and had breached his director's duty by appointing an unlicensed placement agent or broker, and ordered the first plaintiff to refund a sum of RM192,780.00 to the company. The first plaintiff had duly paid this sum of RM192,800.00 to the company (see: [2014] 1 LNS 236; [2014] 11 MLJ 1; [2014] 4 AMR 658).
E	16.4.2014	The company appealed to the Court of Appeal in Civil Appeal No. W-02(NCC)(W)-736-04/2014 against the KLHC's decision in suit 1057 against the first, third, fourth plaintiffs, and another individual by the name of Lee Mee Jiang.
F	8.5.2014	In a subsequent judgment on costs, the KLHC in suit 1057 held as follows: In respect of the first plaintiff, costs of RM516,731.00 was ordered to be paid by the company to the first plaintiff. In respect of the third and fourth plaintiffs, costs of RM220,000.00 was ordered to be paid by the company to the third and fourth plaintiffs.
G	25.8.2015	The Court of Appeal unanimously allowed the company's appeal against the first, third, and fourth plaintiffs, and set aside the KLHC's judgment in suit 1057. ln respect of the first plaintiff, costs of RM50,000.00 for the appeal, as well as costs of RM15,000.00 for the dismissal of the 1st plaintiff's cross-appeal, were ordered to be paid by the first plaintiff to the company. In respect of the third and fourth plaintiffs, costs of RM50,000.00 was ordered to be paid by the third and fourth plaintiffs to the company (see: [2015] 8 CLJ 856)
H	23.9.2015	The first plaintiff, as well as the third and fourth plaintiffs, filed two (2) separate motions to the Federal Court for leave to appeal, i.e. Federal Court Civil Application No. 08-443-09/2015 and 08-446-09/2015 ("Applications for Leave"), which were heard together.
I		

1.3.2016	The Federal Court granted the first plaintiff, as well as the third and fourth plaintiffs, leave to appeal against the Court of Appeal's decision.
4.3.2016	The first plaintiff, as well as the third and fourth plaintiffs filed two (2) separate appeals to the Federal Court, i.e. Federal Court Civil Appeals No. 02(F)-7-03/2016(W) and 02(F)-8-03/2016(W) ("Federal Court Appeals").
14.12.2017	The Federal Court unanimously allowed the appeals by the first plaintiff, as well as the third and fourth plaintiffs. The Court of Appeal order was set aside, and the KLHC's Judgment in suit 1057 was reinstated. In respect of the first plaintiff, costs of RM60,000.00 was ordered to be paid by the company to the first plaintiff. In respect of the third and fourth plaintiffs, costs of RM60,000.00 was ordered to be paid by the company to the third and fourth plaintiffs (see: [2018] 2 CLJ 641; [2018] 1 AMR 517; [2018] 2 MLJ 177 FC)
5.7.2018	The plaintiffs' solicitors issued a letter of demand to the company, demanding for payment of the sum of RM2,394,860.88, being the total legal costs incurred by the plaintiffs in the foregoing matters, as well as the legal costs incurred to-date in claiming the indemnity.
2.8.2018	The company's solicitors issued a letter in response to the plaintiffs' solicitors' letter of demand, disputing the allegations therein.
7.8.2018	The plaintiffs commenced OS391 against the company.

The Arguments

[17] It was argued for the present plaintiffs that they are entitled to be indemnified for their legal costs and expenses (less any party and party costs that were awarded by the courts) as they have been held innocent and vindicated of allegations of the wrongdoings levelled against them by the company per the decision of the Kuala Lumpur High Court in suit 1057, which was subsequently affirmed by the Federal Court.

[18] As such, the present plaintiffs are claiming an indemnity in the sum of RM304,500, after deduction of costs received by them in successfully defending suit 735 in the sum of RM10,000, from the sum of RM314,500 being the total legal costs incurred. P1 is claiming an indemnity in the sum of RM1,446,189.06, after a deduction of costs received by P1 in successfully defending suit 1057 and the appeals arising therefrom in the sum of RM383,951, from the sum of RM1,830,140.06 being the total legal costs incurred. P3 and P4 are claiming an indemnity in the sum of RM565,973.60, after a deduction of costs received by P3 and P4 in successfully defending suit 1057 and the appeals arising therefrom in the sum of RM280,000, from the sum of RM845,973.60 being the total legal costs incurred. The present

A plaintiffs are also claiming for costs on a solicitor-client basis to indemnify them for all legal fees incurred in OS391. In this regard, the present plaintiffs had given notice of this to the company.

[19] Counsel for the company submitted that the plaintiffs are not entitled to rely on s. 289(3)(a) and (b) and/or (4)(a), (b), (c) CA 2016 for any of the B claims herein given that the matters forming the basis of the present plaintiffs' claim took place prior to the coming into force of CA 2016. The company also contends that the present plaintiffs were and are not entitled to rely on article 170 of the articles of association of the company to mount a claim for indemnification. The company also contends that the plaintiffs are not C entitled to an indemnity as they had failed to state that they are entitled to claim costs on an indemnity basis as and when they were awarded costs in the proceedings in contention. Thus, it is contended that they are estopped from claiming costs on an indemnity basis.

[20] It was also argued that suit 735 was dismissed with costs of RM10,000 D pursuant to an application under O. 14A of the Rules of the High Court 1980. The present plaintiffs did not apply for or make any argument that they are entitled to receive costs in the amount of RM304,500, either on the basis of indemnity costs or otherwise from Shamsul in that action. Therefore, the present plaintiffs are now estopped from doing so.

E

[21] Next, in so far as the indemnity claim is concerned, it was argued for the company that as a result of the dismissal of suit 735, the present plaintiffs commenced the claim for indemnification of the costs incurred by the plaintiffs in defending suit 735 by relying on article 170 of the company's articles of association.

F

[22] The indemnity claim was dismissed with costs of RM15,000 for the reasons set out in the grounds of judgment of the High Court, reported as [2013] 4 CLJ 600; [2013] 8 MLJ 280. The plaintiffs' claim for indemnification for the sum of RM304,500 in relation to the dismissal of suit 735 is barred by *res judicata* in light of the decision of the High Court. G

[23] Turning next to suit 1057, it was argued for the company that the case was dismissed with costs by the High Court after full trial. However, P1 was found negligent in appointing an unlicensed placement agent in the divestment exercise of the shares of the company. In that case, costs were H awarded to P1, P3 and P4 and they did not apply for or make any argument that they are entitled to receive costs in the sums which are now claimed herein, either on the basis of indemnity costs or otherwise.

[24] The judgment of the High Court in suit 1057 was subsequently reversed by the Court of Appeal and went up on appeal to the Federal Court. I On 14 December 2017, the Federal Court unanimously allowed the appeals filed by P1, P3 and P4 with costs. P1, P3 and P4 did not apply for or make

any argument in their favour for costs in the amount now claimed, either on the basis of indemnity costs or otherwise. Therefore, the present plaintiffs are estopped.

[25] It was argued for the company that the present plaintiffs' claims herein in respect of suit 735 and suit 1057 and the related appeals, are misconceived and an abuse of process. The company does not dispute that the legal fees claimed by the present plaintiffs herein by way of indemnity were indeed incurred.

[26] Thus, there is no dispute as to the quantum of the legal fees. For completeness, on this point, I should add that during case management on 25 September 2018, counsel for the company confirmed that there is no dispute as to such quantum and/or as to the veracity of the solicitor's invoices. Further, the company did not allege that the legal fees were unreasonably incurred or that the legal fees that were charged were excessive. The sole question here is the company's legal liability to indemnify the present plaintiffs.

[27] As rightly submitted by counsel for the present plaintiffs, there is broadly, only one substantive issue to be determined in OS391, that is - whether the present plaintiffs are entitled to be indemnified by the company for the legal costs incurred in successfully defending suit 735 and suit 1057 (and the appeals) pursuant to article 170 of the articles of association of the company and s. 289(3)(a) and (b), (4)(a), (b) and (c) CA 2016.

[28] Article 170 of the company's articles of association provides that:

> Every director, managing director, agent, auditor, secretary, and other officer for the time being of the Company shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under the Act in which relief is granted to him by the court in respect of any negligence, default breach of duty or breach of trust.

[29] Section 289(3)(a) and (b), 4(a), (b) and (c) CA 2016 provides that:

> 289. Indemnity and insurance for officers and auditors
>
> (3) A company may indemnify an officer or auditor of the company for any costs incurred by him or the company in respect of any proceedings:
>
> (a) that relates to the liability for any act or omission in his capacity as an officer or auditor; and
>
> (b) in which judgment is given in favour of the officer or auditor or in which the officer or auditor is acquitted or in which the officer or auditor is granted relief under the Act, or where proceedings are discontinued or not pursued.

A (4) A company may indemnify an officer or auditor of the company in respect of:

(a) any liability to any person, other than the company, for any act or omission in his capacity as an officer or auditor; and

B (b) costs incurred by that director or officer or auditor in defending or settling any claim or proceedings relating to any such liability except

(i) any liability of the director to pay:

(A) a fine imposed in criminal proceedings; or

C (B) a sum payable to a regulatory authority by way of a penalty in respect of non-compliance with any requirement of a regulatory nature, however arising; or

(ii) any liability incurred by the director:

(A) in defending criminal proceedings in which he is convicted; or

D (B) in defending civil proceedings brought by the company, or an associated company, in which judgment is given against him; or

(c) in connection with an application for relief under this Act.

E **[30]** In the course of arguments, reference was also made to the Companies Act 1965 ("CA 1965") which similarly provided for such indemnification. The relevant section is s. 140 CA 1965 and it reads as:

140. Provisions indemnifying directors or officers

F (1) Any provision, whether contained in the articles or in any contract with a company or otherwise, for exempting any officer or auditor of the company from, or indemnifying him against, any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the company, shall be void.

G (2) Notwithstanding anything in this section a company may pursuant to its articles or otherwise indemnify any officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application in relation thereto in which relief is under this Act granted to him by the Court.

H **[31]** In answer to the company's contention that the present plaintiffs are not entitled to rely on the CA 2016 (as it was not in force at the time of the matters forming the basis of this claim), it was argued for the present plaintiffs that the Federal Court decision was pronounced on 14 December 2017 which was after the CA 2016 came into force on 31 January 2017.

I

[32] And this claim *via* OS391 was made on 7 August 2018 which is after CA 2016 came into effect. Counsel for the present plaintiffs also said that the relevant provisions relied upon by the present plaintiffs are consistent with s. 140 CA 1965 in that the law at all material times entitles the plaintiffs to seek an indemnity as per the terms of the articles of association of the company.

[33] Next, in response to the company's argument that the present plaintiffs are estopped from bringing this claim for an indemnity as they did not state that they would do so at the time when the decisions in suit 735 and suit 1057 were given, it was submitted on behalf of the present plaintiffs that there is no law or procedure which requires them to do so. Lastly, the present plaintiffs also argue that there is no such requirement provided in the company's articles of association.

[34] The present plaintiffs relied on the High Court judgment by Justice Ariff in OS73 (see: *Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors v. Perdana Petroleum Bhd* [2013] 4 CLJ 600; [2013] 8 MLJ 280) to support their claim for an indemnity on the basis that the company's articles of association constituted the contract of appointment of the present plaintiffs as directors of the company. In that case, the learned judge took into account the principles of law which were enunciated in *Anglo-Austrian Printing and Publishing Union (Re Isaac's Case)* [1892] 2 Ch 158; *Globalink Telecommunications Ltd v. Wilmbury Ltd And Others* [2002] EWHC 1988 QBD; and *Chee Kheong Mah Chaly And Others v. Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571.

[35] Justice Ariff held ([28] and [29]) that "it takes very little to incorporate article 170 herein into the contract between the present plaintiffs and the company since obviously these persons must have been appointed on the footing of the articles, just as they were subsequently dismissed on the same footing at the EGM of the company". He explained that this is in line with commercial realities when it comes to the appointment of directors in companies. In para. [27] he said:

> [27] The analysis of the office of a director being one of trust or agency depending on the facts, and for which the director will have a right to be indemnified from the assets of the company for expenses incurred on behalf of the company is a better explanation of the legal position of a director in a company … The issue is to what extent the terms of the articles of association can be imported or incorporated into this contractual relationship? The cases suggest the incorporation depends on whether the director's appointment is done 'on the footing of the articles'. In this connection again, a healthy dose of commercial reality will assist in understanding and formulating a rational basis for the law. I am tempted to ask: in these days of sophisticated corporate affairs and detailed company law provisions, *how else can directors be appointed to the*

A *board except on 'the footing of the articles'? It is an obvious necessary pre-condition for a valid board appointment. In this sense, the view that 'it takes very little' to incorporate the articles into the director's contract can be more readily and realistically understood.* (emphasis added)

[36] For the present plaintiffs it was contended that by virtue of having B been appointed as directors *via* the company's articles of association, article 170 is incorporated into the plaintiffs' contractual relationship with the company. The plaintiffs may therefore rely on article 170 to claim indemnity for costs incurred by them in defending suit 735 and suit 1057.

[37] In particular, reference was made to *Anglo-Austrian Printing and* C *Publishing Union (Re Isaac's Case)* [1892] 2 Ch 158 at 164-165 which reads:

... I think, then, that where a man has accepted the office of director, and acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and D on the part of the company that he shall receive the remuneration, and all the benefits which those articles provide for directors. To use the language of the present Master of the Rolls in *Swabey v. Port Darwin* Gold Mining Company (1), 'the articles do not themselves form a contract, but from them you get the terms upon which the directors are serving.'

E **[38]** It was argued for the present plaintiffs, that Justice Ariff's judgment in OS73 is authority for the proposition that the present plaintiffs are entitled to claim for indemnity pursuant to article 170. It was also contended that the sole reason for dismissal OS73 was that at that time, suit 735 was dismissed pursuant to the present plaintiffs' of O. 14A application, which determined F that Shamsul could no longer proceed with the derivative action as the present plaintiffs were no longer in control of the company upon their removal at the EGM. Accordingly, there was no finding on the merits of suit 735. Hence, there was (at that time) no judgment vindicating or holding the present plaintiffs to be innocent of the allegations which had been levelled against them.

G **[39]** This comes out quite clearly from para. [34] where Justice Ariff held:

On the facts of this present case, as earlier stated, the derivative action was dismissed purely on the ground of failure of substratum since the plaintiffs here, being dismissed at the EGM, were not longer in control of the company to attract the exception to the rule in *Foss v. Harbottle* H (1843) 2 Hare 461 (VC) and to support the derivative action. There was no judgment in relation to the issue of liability of the plaintiffs for the alleged breaches of duty as directors. The plaintiffs have not been held innocent of the allegations not vindicated.

I **[40]** And in relation to suit 1057, the company at that point had just begun the said action against the present plaintiffs (with exception of P2) and there was likewise no finding yet of the innocence of the plaintiffs. In this regard, Justice Ariff observed:

> The company itself is now pressing ahead with its own claim against them based essentially on the same allegations. It would be grossly wrong in these circumstances to allow the company's assets to be used to pay the legal costs incurred by the plaintiffs.

[41] It was emphasised that the present plaintiffs have since been found innocent and are therefore vindicated of the allegations of wrongdoing in their respective capacities as directors of the company. It was argued for the present plaintiffs that based on the Federal Court's and (earlier) High Court's judgment (per Justice Nallini) in favour of the present plaintiffs which effectively demolished all the allegations of fiduciary breaches against the present plaintiffs, article 170 would thus bite. Accordingly, it was contended that in the same vein that OS73 was dismissed, Justice Ariff's judgment would now apply to allow the present plaintiffs' claim herein.

[42] In this regard, reference was also made to the Australian case of *Fay v. Moramba Services Pty Ltd* [2010] NSWSC 725 at para. 13:

> 13. However, a condition of entitlement to the indemnity is that there be (in the case of a civil proceeding) judgment in favour of the director, or (in the case of a criminal proceeding) an acquittal. In *Emanuel Management Pty Ltd (in liq) v. Emanuele* (2002) 83 SASR 501, Wicks J (at 517) held that a permanent stay of criminal proceedings was not an acquittal or a judgment within the meaning of an identical article, observing:
>
> > It must be stressed that indemnity out of the assets may be afforded to a director only where judgment is given in his favour. The order … was that the proceedings on the information be permanently stayed. There was no acquittal; nor was there a committal for a re-hearing. For these reasons, I am of the opinion that Article 118 of the plaintiff company's Articles of Association has no application in this matter.

[43] It was argued for the company that the question of whether the company has the legal power to indemnify directors ultimately turns on two points. Firstly, under the CA 1965, s. 140 permitted companies to indemnify officers or auditors as provided. Section 140 provided as follows:

> 140. Provisions indemnifying directors or officers
>
> (1) Any provision, whether contained in the articles or in any contract with a company or otherwise, for exempting any officer or auditor of the company from, or indemnifying him against, any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the company, shall be void.
>
> (2) Notwithstanding anything in this section a company may pursuant to its articles or otherwise indemnify any officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application in relation thereto in which relief is under this Act granted to him by the Court.

[44] It was argued for the company that s. 140(2) was merely an enabling provision which authorised companies to indemnify its officer or auditor ("officers"), such authorisation extending only to the limits set in place by s. 140(1). The authority and power to do so was as provided for under the articles of association or otherwise. In *Cotman v. Brougham* [1918] AC 514, Lord Parker said at p. 520:

> The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. *In the first place it gives protection to subscribers, who learn from it the purposes to which their money can be applied. In the second place it gives protection to persons who deal with the company, and who can infer from it the extent of the company's powers.*
>
> The narrower the objects expressed in the memorandum the less is the subscribers' risk, but the wider such objects the greater is the security of those who transact business with the company. (emphasis added)

[45] Next, counsel for the company also referred to corporate powers accountability, where the learned author wrote at paras. 4-79:

> *A company, owing to its entire existence to statute, cannot have more powers than that conferred upon it by the Act or its constitutional documents.* In *Ooregum Gold Mining Co of India Ltd v. Roper* [1892] AC 125, Lord Halsbury LC said:
>
> > ... the whole structure of a limited company owes its existence to the Act of Parliament, and *it is to the Act of Parliament one must refer to see what are its powers and within what limits it is free to act*.
>
> (emphasis added)

[46] In amplification, counsel for the company said that the word "otherwise" appearing in s. 140(1) CA 1965 is understood as referring to an obligation under contract. This interpretation is suggested by harmonising s. 140(1) which speaks of "any provision in the articles or in any contract with a company or otherwise", with s. 140(2) which speaks of an authority to indemnify pursuant to its "articles or otherwise". By virtue of article 170, the company was empowered to indemnify its officers to the extent permitted by that article.

[47] The articles of association of the company including article 170 are saved by s. 619(3) CA 2016. Thus, the power to indemnify remains in place to the extent, and subject to the limits, of article 170 and s. 140 CA 1965. Section 619(3) provides:

> The memorandum of association and articles of association of an existing company in force and operative at the commencement of this Act, and the provisions of Table A under the Fourth Schedule of the Companies Act 1965 if adopted as all or part of the articles of association of a company at the commencement of this Act, shall have effect as if made or adopted under this Act, unless otherwise resolved by the company.

[48] As for the impact of ss. 288 and 289 CA 2016, counsel for the company said that it is necessary to appreciate what these provisions allow, as there is an apparent difference in language between s. 289 CA 2016 and s. 140(2) CA 1965. Counsel said that s. 140(2) CA 1965 did not purport to vest any free-standing power to indemnify and the provision was one that authorised indemnification pursuant to the articles or contract or otherwise.

[49] However, *ex facie*, s. 289(3) and (4) CA 2016 appear to authorise a company to indemnify its officers in the stated circumstances. This is expressed without reference to the constitution or contract or otherwise. The authorised indemnification also covers a broader range of matters (the first interpretation). However, it was argued for the company that reading s. 289 CA 2016 harmoniously with s. 288 CA 2016 potentially offers a different interpretation.

(i) Section 288 CA 2016 declares void any provision in the constitution, a contract or otherwise which seeks to indemnify in respect of matters prohibited by that provision. As it is apparent, that section is focused on a provision in the constitution, contract or otherwise.

(ii) This points to Legislature having had in mind the existence of indemnity provisions in the constitution of a company or in contracts or otherwise. This would then mean that the power and authority to indemnify must find foundation in such.

(iii) This intention must therefore be brought into the frame when interpreting s. 289(3) and (4) CA 2016 given that pursuant to s. 17A, Interpretation Acts 1948 and 1967, the courts are obliged to interpret legislation purposively.

(iv) Thus, it was contended for the company that s. 289(3) and (4) CA 2016 must be understood as being merely enabling provisions and not vesting any free-standing power or obligation to indemnify (the second interpretation). This is consistent with the legal effect of constitutions with respect to the delimiting of corporate power.

(v) The company contends that if the court accepts the second interpretation, s. 289(3) and (4) CA 2016 are irrelevant to the present plaintiffs' claim.

The Availability Of Sections 289(3) And (4) CA 2016 To The Plaintiffs

[50] The next line of argument by the company is that in the event the first interpretation is adopted/applied, then the question that needs to be answered is whether the present plaintiffs are entitled to invoke the right to an indemnity under s. 289(3) and (4) CA 2016 given that, save for the Federal Court proceedings in respect of suit 1057, the legal proceedings were terminated prior to the coming into force of the CA 2016. This is evident from the common chronology of events. The company also contends that if the present plaintiffs were entitled to be indemnified prior to the coming into

force of the CA 2016, then by virtue of s. 620(4) CA 2016, the present plaintiffs are only entitled to pursue the same under CA 1965 as they are in effect seeking to give effect to a right of indemnification.

[51] For clarity, s. 620(4) CA 2016 provides:

> Any right, privilege, obligation or liability acquired, accrued or incurred before the effective date or any legal proceedings, remedy or investigation in respect of such right, privilege, obligation or liability shall not be affected by this Act and shall continue to remain in force as if this Act has not been enacted.

[52] According to the company, it would then follow that the present plaintiffs are not entitled to rely on ss. 289(3) and (4), CA 2016 to make claims for indemnification save for the costs associated with the Federal Court proceedings. The present plaintiffs cannot rely on s. 140 CA 1965 at this juncture. The foundation for such claims is a matter of substance which cannot be disregarded as mere technicalities.

The Right To Indemnification

[53] According to the company, if the present plaintiffs are not able to establish that s. 289(3) and (4) CA 2016 provides them with the right to seek indemnities, they must establish some other legal basis for their claim for indemnity. In this regard, it was argued that as a general principle, parties seeking indemnification must be able to point to a statutory right, a contractual right or an equitable right to the same. This was made clear by the UK House of Lords in *Eastern Shipping Co v. Quah Beng Kee* [1924] AC 177 where Lord Wrenbury said at pp. 182-183:

> *A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other.* There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do.
>
> *The right to indemnity need not arise by contract; it may (to give other instances) arise by statute*; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon's words in *Waring v. Ward* (1802) 7 Ves. 332; a case of vendor and purchaser) in cases in which the Court will "independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation" of the vendor. (emphasis added)

[54] In as much as the present plaintiffs sought to rely on s. 289(3) and (4), CA 2016 and article 170 of the articles of association, it was argued for the company that article 170 of the articles of association cannot be understood as in itself vesting a right in the present plaintiffs for indemnification.

[55] The articles of association is a contract between members and the defendant to which the present plaintiffs are not privy. As third parties to that contract, the present plaintiffs have no right to enforce its terms. In *Malayan Banking Ltd v. Raffles Hotel Ltd* [1965] 1 LNS 107; [1966] 1 MLJ 206, Ambrose J said at p. 208 (MLJ):

> In considering this section, it must be borne in mind that *the articles do not in any circumstances, as between the company and a person who is not a member, constitute a contract of which that person can take advantage*: see 6 *Halsbury's Laws of England*, 3rd edition, page 129, paragraph 270. As was said by Astbury J. in *Hickman Kent Or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881 at p 897 and 900 at pages 897 and 900 respectively:
>
> > *An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles treating them as contracts between himself and the company to enforce those rights*.
>
> Those rights are not part of the general regulations of the company applicable to all shareholders and *can only exist by virtue of some contract between such person and the company, and the subsequent allotment of shares to an outsider in whose favour such an article is inserted does not enable him to sue the company on such an article to enforce rights which are res inter aliosacta and not part of the general rights of the corporators as such*.
>
> ...
>
> I think this much is clear, first that *no article can constitute a contract between the company and a third person; secondly, that no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter or director, can be enforced against the company; and, thirdly, that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively*. (emphasis added)

[56] In the absence of a statutory right, the present plaintiffs must therefore rely on a contract or equity. The present plaintiffs have not done so for the purpose of the claim herein. To reiterate, they purport to rely on the statutory provisions and article 170 of the articles of association. In amplification, counsel for the company said that though Justice Ariff did discuss, in *Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors v. Perdana Petroleum Bhd* [2013] 4 CLJ 600; [2013] 8 MLJ 280 a contractual right to indemnification, that was stated in the context of a premature claim. The learned judge's observations on the subject were *obiter*. In any event, the present plaintiffs have not pleaded their claim on the footing of a contractual or equitable right.

Subject Matter Not Capable Of Indemnification

[57] In any event, the present plaintiffs seek indemnification in respect of claims against them by the company for breaches of fiduciary and trust duties, and negligence in relation to the company. This is regardless of

whether they have been "vindicated" by the Federal Court or otherwise. The question of what claims may fall within the ambit of indemnification is one that ultimately turns on the proper interpretation of article 170. It was submitted for the company that a true construction of article 170 would lead to the conclusion that such claims can only be permitted for expenditure related to things that the present plaintiffs were under a duty to do.

[58] In *Tomlinson v. Liquidators of Scottish Amalgamated Silks, Limited* [1935] SC (HL) 1, the House of Lords considered a similar claim for indemnification. The claim centred on article 160 of the articles of association of the respondent company which resembles article 170 of the articles of association. Article 160 of the respondent's articles of association read as follows:

> Every Director, trustee, manager, secretary, and other officer or servant of the Company shall be indemnified by the Company against, and it shall be the duty of the Directors out of the funds of the Company to pay, all costs, losses, and expenses which any such Director, officer, or servant may incur or become liable to by reason of any contract entered into, or act or deed done by him, as such Director, officer, or servant, in any way, in the discharge of his duties, including all travelling expenses.

[59] In *Tomlinson*'s case, the company had gone into voluntary liquidation. The liquidators commenced an action for fraud against Tomlinson who was a director of the company. Tomlinson was acquitted. He then sought an indemnity in respect of the expenses incurred by him in defending the action for fraud. Tomlinson argued that he was entitled to the same by reason of article 160 as the expenses incurred were in consequence of acts done by him as agent of the company. The House of Lords disagreed with Tomlinson. It held that the expenses incurred by Tomlinson in defending the action for fraud were not expenses incurred by reason of an act done by Tomlinson as a director in the discharge of his duty. Lord Tomlin said at pp. 6 to 7:

> Here the allegation against the agent was that he had done something which he did not in fact do, and which it would have been against his duty to have done; and *the question really is upon the construction of the article. whether the expenses incurred by him by reason of an allegation that he did something which he did not do, and which it was not his duty to do, are expenses incurred by him by reason of an act done by him as a director in discharge of his duty. Upon the true construction of that article I am unable to see how that can possibly be maintained. In my view the expenses incurred by reason of the allegations made against the deceased, being allegations of matters which would have been a breach of his duty and which were held to be disproved or non-proven, are not expenses incurred by him by reason of an act done by him as a director in the discharge of his duties.* If the case does not fall, as I think it does not fall, within the language of article 160 of the articles of association, it is difficult to see upon what principle it can possibly be brought within the common law rule. My conclusion is that this appeal fails, and I recommend to your Lordships that it be dismissed with costs. (emphasis added)

[60] In *Rowland v. Gulfpac Ltd; Lnoco Pie And Others v. Gulf USA Corporation and others* [1995] Lexis Citation 1631, the English High Court had occasion to consider s. 310(3) of the English Companies Act 1985 which largely corresponds with s. 140, CA 1965. Rix J said:

> If the costs which are to be considered are costs ordered against the directors, then that might be viewed as a liability ancillary to the principal liability. In such a case costs and liability plainly go together. But costs incurred as an expense, as occurs in the United States, where it is common ground there are no adversarial orders for costs, or in England as part of the directors' own English proceedings, *costs incurred in defending or prosecuting actions are not, it seems to me, costs incurred or sustained in or about the execution of a director's duties to Gulfpac or otherwise in relation thereto*.
>
> This view is to my mind fortified by two other considerations. The first arises out of the terms of s. 310(3)(b) of the Companies Act 1985. Section 310(1) and (2) provides that any provision contained in a company's articles or in any contract with a company indemnifying an officer of the company from any liability in respect of any negligence, default, breach of duty or breach of trust, is to be void. However, s. 310(3) then provides as follows:
>
> This section does not prevent a company ...
>
> (b) from indemnifying any such officer or auditor against any liability incurred by him.
>
> (i) in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or he is acquitted ...
>
> *It seems to me that that subsection emphasises both by its function and by its language that a liability for costs incurred in the successful defence of any proceedings is something different from a liability for costs sustained or incurred in the execution of the directors' duties to a company or, indeed, in relation thereto.*
>
> (emphasis added)

[61] In *Christchurch City Council v. Davidson* [1997] 1 NZLR 275, the respondent was arrested and charged for sexual abuse but was subsequently discharged by the trial judge. The New Zealand Employment Court awarded the respondent, amongst others, compensation by way of indemnity in respect of his costs of defending the criminal proceedings. This was appealed against the New Zealand Court of Appeal. Citing Tomlinson with approval, Richardson P allowed the appeal and observed at p. 294:

> While the appeal on the indemnity question must accordingly fail, we should record that *the indemnification of agents at common law does not extend to expenses incurred in defending an allegation that the person charged did something which he or she did not in fact do and which it was not his or her duty to do. The reason is that such expenses were not incurred by the worker as an agent of the*

A *employer in the reasonable performance of the worker's duties* (*Tomlinson v. Adamson* 1934 SC 85; *Nathan v. Kiwi Life and General Mutual Assurance Co Ltd (In Statutory Receivership and In Liquidation)* (1982) 1 BCR 416).

(emphasis added)

B **[62]** In *Chee Kheong Mah Chaly and others v. Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571, the appellants were partners in an audit firm. The company appointed them as auditors. Subsequent to the winding-up of the company, the liquidators commenced negligence proceedings against the appellants. One of the questions before the Singapore Court of Appeal was whether the appellant was entitled by virtue of
C article 110 of the articles of association of the company to be indemnified extended to costs incurred by the appellants in defending the negligence action.

[63] The Singapore Court of Appeal found that costs incurred by the appellants in defending the negligence action were not costs incurred in the
D execution of their duties as auditors. Chao Hick Tin JA said at p. 579:

27. It would be noted that the crucial words in art 110 are "losses or liabilities (including any such liability as is mentioned in the Act) which he may sustain or incur in or about the execution of the duties of his office or otherwise in relation thereto". *In defending the DFS action, D&T*
E *was not doing anything in execution of its duties as auditors or "in relation to" those duties. It was defending an action brought well after it ceased to be auditors which alleged that while D&T was DFS' auditors, it did not perform its duties as it should. The costs were not incurred in execution of its duties as auditors or in relation thereto.*

(emphasis added)

F **[64]** Chao Hick Tin JA went on to discuss with approval the *ratio* of the English Courts in *Tomlinson* and *Rowland* from pp. 579-582 and concluded as follows:

36. Adopting the approach taken in *Tomlinson v. Adamson*, and the views expressed in *Rowland v. Gulfpac*, we hold that in defending the action
G brought by BFS for negligence, D&T's costs would not be losses incurred in or about the execution of its duties as auditors, or in relation thereto, but were expenses incurred for alleged non-performance of its duties. There is a clear parallel between the situation in Tomlinson and that in our present case. In the former, the director had to defend himself against
H charges of fraud and here the auditors against charges of negligence. The two situations are analogous.

[65] The Singapore Court of Appeal dismissed the appellants' argument on the general principles of common law that an agent is entitled to be indemnified by his principal by distinguishing the case of *In re Famatina*
I *Development Corporation Limited* [1914] 2 Ch 271 which was cited by the appellants. Chao Hick Tin JA said at pp. 583-584:

> 40. The judge below noted that in *Famatina* the proceedings against the agent were brought by a third party. In our opinion, this is a relevant point of distinction. *Otherwise it would mean that whenever a principal takes action unsuccessfully against an agent for what the latter had allegedly done negligently, the principal would have to indemnify the latter for the costs incurred. There cannot be such an implied term. There is no reason why a contract of agency should be any different from any other contract in so far as disputes between the parties are concerned.*
>
> 41. Moreover, *Famatina* was also distinguished by Lord Tomlin in *Tomlinson v. Adamson* on the basis that in *Famatina* the expenses arose directly out of that which it was the duty of the agent to do and which he had in fact done. *In Tomlinson the allegation against the agent was that he had done something which he did not, in fact, do and which it would have been against his duty to have done (similar to our case).*
>
> 42. In the light of our views above, *the costs incurred by D&T in successfully defending the PLC's action, as well as those incurred by Mah (or D&T) in the disciplinary proceedings would similarly not fall within the scope of art 110.*
>
> (emphasis added)

[66] It was therefore argued on behalf of the company that the legal costs incurred by the present plaintiffs in the legal proceedings were not expenses incurred by them in the discharge or execution of their duties as directors of the company. In amplification, it was contended that:

(i) The present plaintiffs were not agents of the company for the purpose of defending the legal proceedings;

(ii) They were not defending the legal proceedings for the benefit and on behalf of the company;

(iii) The present plaintiffs defended the legal proceedings in their own rights.

[67] Thus, the company contends that the "vindication" or otherwise by the Federal Court is an immaterial consideration. The cost and expense of the litigation against the present plaintiffs was a matter to be taken up by them at the appropriate juncture during the course of the legal proceedings pursuant to O. 59, Rules of Court 2012 ("ROC"), r. 55, Rules of the Court of Appeal 1994 and r. 85, Rules of the Federal Court 1995. They were awarded costs for the proceedings at all stages. Order 59 r. 1 ROC defines "costs" to include "includes fees, charges, disbursements, expenses and remuneration". There is no question of the present plaintiffs' "losing out". The quantum of costs was a matter left to the discretion of the respective courts and the applicable rules.

[68] In conclusion, it was argued for the company that the present plaintiffs had every opportunity to address the respective courts on the quantum of costs and should not be permitted to revisit the matter by a side-wind through a claim for indemnification such as the one made herein.

A

Analysis And Conclusions

[69] Plainly, there is only one substantive issue to be determined in OS391 - whether the present plaintiffs are entitled to be indemnified by the company for the legal costs incurred by them in successfully defending suit 735, suit 1057, defending the company's appeal to the Court of Appeal and finally in prosecuting the appeal(s) to the Federal Court.

B

[70] At the outset, it is to be noted that the quantum of the plaintiffs' claims in OS391 is not in dispute. It was not and cannot be argued that the quantum of legal fees and disbursements were all properly and validly incurred by the present plaintiffs in defending suit 735 and suit 1057, opposing the appeal in the Court of Appeal and prosecuting the appeal(s) in the Federal Court.

C

[71] The first substantial issue here is whether the present plaintiffs may rely upon s. 289 CA 2016 to mount a claim for indemnity, by reason of the fact that the events giving rise to the filing of suit 735 and later suit 1057, occurred prior to 31 January 2017 which is the date of coming into force of CA 2016. The related issue is, if the present plaintiffs are not entitled to rely on s. 289 CA 2016, then whether they are entitled to the costs/expenses incurred only in respect of the Federal Court appeal wherein the decision was delivered on 14 December 2017.

D

E

[72] Next, with reference to the interpretation of s. 140(2) CA 1965, whether it is a mere enabling provision which permits a company to indemnify its director for legal expenses incurred in successfully defending "any proceedings, whether civil or criminal in which judgment is given in his favour ...".

F

[73] The other question is whether article 170 of the company's articles of association also indemnifies a director for legal expenses in "defending any proceedings, whether civil or criminal, ... in respect of any negligence, default breach of duty or breach of trust."

G

[74] In so far as article 170 is concerned, the company's argument is that it is not available to the present plaintiffs as there is no contract between the company and the plaintiff and that the articles do not constitute the terms of a contract between the company and the director. It was also argued that it is only to indemnify for proceedings brought by a third party against the directors.

H

[75] Contrary to the company's interpretation, the view I take is article 170 is not confined to a claim for indemnity by a director for successfully defending himself against a suit brought by a third party. The language of article 170 in the present case is sufficiently wide enough to encompass within its scope, a claim for indemnity for proceedings by the company against the director.

I

[76] It is also clear from the judgment of Justice Ariff in OS73 that the right to an indemnity under article 170 existed at the material time but the claim was considered premature at that time as suit 735 was not dismissed on merits but rather on *locus standi*. Following the *obiter* judgment of Justice Ariff in OS73, it seems that it "takes very little" to import the articles of association into the relationship between the company and the directors who would have been/were appointed on the footing of the articles of association and later removed at the EGM, also based on the provisions of the very same articles of association.

[77] In this regard, it is instructive to have regard to the judgment of Justice Ferris in *John v. Price Waterhouse* [2001] 1 WLR 953 at [26] where he said, "... It seems to me that comparatively little will be required to satisfy the court that in particular cases, the indemnity provided for by regs. 136 and 118 is incorporated in the contract which is made when the company appoints a director or an auditor".

[78] Hence, by virtue of having been appointed as directors *via* the articles of association, it follows that article 170 is necessarily incorporated into the present plaintiffs' contractual relationship with the company. The present plaintiffs may therefore rely on article 170 to claim indemnity for costs incurred by them in defending suit 735 and suit 1057.

[79] In my view, the articles of association form part of the contract between the company and the present plaintiffs (*qua* former directors) and are entitled to the indemnity under article 170. It is unarguable that the present plaintiffs were appointed and later removed pursuant to the articles of association. It defies logic and common sense that the articles are there only for appointment and removal of directors and that article 170 should thereafter be ignored as being of no consequence from a contractual perspective. It is indisputable that the present plaintiffs have been found innocent and are therefore vindicated of the allegations in their respective capacities as directors of the company. The judgments of the Federal Court and High Court are judgments in favour of the present plaintiffs which effectively demolished all the allegations against the present plaintiffs. Article 170 would thus bite.

[80] Accordingly, in the same vein that the present plaintiffs' previous indemnity claim (*via* 0S73) was dismissed, Justice Ariff's judgment would now apply to allow the present plaintiffs' claim herein. In this regard, it is relevant to refer to the Australian case of *Fay v. Moramba Services Pty Ltd* [2010] NSWSC 725 at para. [13] where it was said:

> [13] However, a condition of entitlement to the indemnity is that there be (in the case of a civil proceeding) judgment in favour of the director, or (in the case of a criminal proceeding) an acquittal. In *Emanuel*

A *Management Pty Ltd (in liq) v. Emanuele* (2002) 83 SASR 501, Wicks J (at 517) held that a permanent stay of criminal proceedings was not an acquittal or a judgment within the meaning of an identical article, observing:

> It must be stressed that **indemnity out of the assets may be afforded to a director only where judgment is given in his favour**. The order … was that the proceedings on the information be permanently stayed. There was no acquittal; nor was there a committal for a re-hearing. For these reasons, I am of the opinion that Article 118 of the plaintiff company's Articles of Association has no application in this matter. (emphasis added)

[81] The next issue is whether the fact that during the course of all the proceedings in the High Court, Court of Appeal and Federal Court, party and party costs were ordered and the present plaintiffs did not at that time seek costs on an indemnity basis, is fatal. In my view, the failure on the part of the present plaintiffs to previously seek an order for costs on an indemnity basis from the respective courts is not fatal. The claim for costs indemnification can and should, for all practical reasons, be made subsequently in separate proceedings for this purpose so that there can be proper argument and mature consideration on the multifarious issues that could arise (as it did in OS391).

[82] Hence, this (OS391) is the proper forum for the present plaintiffs to make the claim for indemnity under article 170. On this issue, it is I think relevant to refer to *Chee Kheong Mah Chaly v. Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571 where the Singapore Court of Appeal opined that a separate claim may be made to claim these costs:

> [20] In *John v. Price Waterhouse* [2002] 1 WLR 953, the first defendant, Price Waterhouse ("PW"), successfully defended an action brought by four claimants, the second, third and fourth claimants being companies, and an order for costs on the standard basis in favour of PW was made and perfected.
>
> At the time of hearing, PW had only asked for standard costs. Subsequently, PW sought to have the costs order varied to that of an indemnity basis on the ground, *inter alia*, that under the Articles of Association of those companies, PW was entitled to indemnity costs. Ferris J did not think he should at that stage vary the order as it was not absolutely clear that there would be no defence to the contractual claim for indemnity costs as there were factual issues to be gone into to determine whether the articles of the companies were incorporated into the contract between PW and the companies.
>
> [21] Ferris J was of the view that, in the circumstances, **a fresh action by PW would be the proper course**. In taking this approach he had regard to the decision in *Gomba Holdings (UK) Ltd v. Minories Finance Ltd (No 2)* [1993] Ch 171, where the Court of Appeal held that *the fact that some orders*

were made for the mortgagor to pay some of the mortgagee's costs taxed on the standard basis did not preclude the mortgagee from claiming costs on the indemnity basis pursuant to contractual rights. (emphasis added)

[83] I turn yet again to the Singapore Court of Appeal case of *Chee Kheong Mah Chaly v. Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] SGCA 28; [2003] 2 SLR(R) 571. In that case, the appellants were partners in an accounting firm, Deloitte & Touche ("D&T"). In 1986, Baring Futures (Singapore) Pte Ltd ("BFS") sent a letter, with its memorandum and articles of association enclosed, to D&T containing an offer to appoint the latter as its auditors. This was accepted. D&T ceased to be the auditors of BFS in 1994. BFS's parent company was Baring plc of London ("PLC"). Both BFS and PLC subsequently went under liquidation.

[84] The liquidators of BFS (respondents), PLC and their related company ("BL") instituted proceedings in London to recover damages from D&T for negligence in the discharge of their duties as auditors of BFS. D&T brought two motions in the High Court seeking certain reliefs which raised the issue of whether D&T was entitled under article 110 to claim an indemnity from BFS in respect of costs incurred in defending the BFS, PLC and PAB actions.

[85] This depended on whether article 110 was incorporated into the contract between BFS and D&T appointing the latter as auditors ("the contract"); and on whether the scope of the indemnity provided in article 110 extended to such costs; and (ii) whether any indemnity costs which might be awarded to D&T in the BFS action pursuant to article 110 would be entitled to any priority against other claims in the winding up of BFS. The High Court Judge gave a negative answer to the issue and refused the reliefs sought.

[86] Article 10 of BFSs articles of association provided that:

> Every Director or other officer of the Company shall be entitled to be indemnified out of the assets of the Company against all losses or liabilities (including any such liability as is mentioned in the Act),which he may sustain or incur in or about the execution of the duties of which he may sustain or incur in or about the execution of the duties of his office or otherwise in relation thereto, and no such Director or other officer shall be liable for any loss, damage or misfortune which may happen to be incurred by the Company in the execution of the duties of his office in relation thereto. But this Article shall only have effect in so far as its provisions are not avoided by the Act.

[87] The Singapore Court of Appeal's discussion on the scope of article 110 may be gleaned from the following:

> [26] In coming to his conclusion that article 110 did not cover the indemnity costs incurred by D&T in defending an action brought by DFS for negligence, the court below relied very much upon two cases: *David John Rowland v. Gulfpac Limited; Inoco plc v. Gulf USA Corporation* [1999] Lloyd's Rep Bank 86 and *Tomlinson v. Adamson* [1935] SC 1.

A [27] It would be noted that the crucial words in art 110 are "losses or liabilities (including any such liability as is mentioned in the Act) which he may sustain or incur in or about the execution of the duties of his office or otherwise in relation thereto". In defending the DFS action, D & T was not doing anything in execution of its duties as auditors or "in relation to" those duties. It was defending an action brought well after B it, eased to be auditors which alleged that while D & T was DFS' auditors, it did not perform its duties as it should. The costs were not incurred in execution of its duties as auditors or in relation thereto.

[28] In this connection, it is pertinent to compare article 110 with art 113 in Table A of the Companies Act where the relevant part reads:

C

> Every director ... auditor ... shall be indemnified out of the assets of the company against any liability incurred by him in defending **any proceedings**, whether civil or criminal, in which judgment is given in his favour ...

[29] The fact that the promoters of BFS **decided to adopt a different set** D **of wording from that spelt out in article 113 of Table A is significant**. In our opinion, the change clearly indicated that the promoters had something different in mind. There is no reference to "proceedings". We think D & T's argument is speculative when it says that in adopting the formula in art 110, the promoters had something wider in mind.

E (emphasis added)

[88] I turn next to *Tomlinson v. Liquidators of Scottish Amalgamated Silks Limited* [1935] SC (HL) p. 1. In that case, the applicant (Tomlinson) sought to obtain an indemnity for the costs incurred in defending himself against criminal proceedings. The criminal charge was that being a promoter and F director and chairman of the company, he took part in the issue of a fraudulent prospectus whereby the public were induced to subscribe for shares in the company. He was also charged for having taken part in the fraudulent allotment of certain shares in the company and for taking part in fraudulent misappropriation of certain monies of the company. He was tried G and acquitted of these charges. He relied on article 160 of the company's articles of association which provided that:

> Every Director, trustee, manager, secretary and other officer or servant of the Company shall be indemnified by the Company against and it shall be the duty of the Directors out of the funds of the Company to pay, all H costs, losses, and expenses which any such Director, officer, or servant may incur or become liable to by reason of any contract entered into, or act or deed done by him, as such Director, officer, or servant, in any way, in the discharge of his duties, including all travelling expenses.

[89] Mr Tomlinson's claim for indemnity was dismissed. In dismissing I Mr Tomlinson's appeal, Lord Tomlin (p. 607) opined that:

> Here the allegation against the agent was that he had done something which he did not in fact do, and which it would have been against his duty to have done; and the question really is, upon the construction of

> the article, whether the expenses incurred by him by reason of an allegation that he did something which he did not do, and which it was not his duty to, are expenses incurred by him by reason of an act done by him as a director in discharge of his duty. Upon the true construction of that article I am unable to see how that can possibly be maintained.
>
> In my view the expenses incurred by reason of the allegations made against the deceased, being allegations of matters which would have been a breach of his duty and which were held to be disproved or non-proven, are not expenses incurred by him by reason of an act done by him as a director in the discharge of his duties. If the case does not fall, as I think it does not fall, within the language of article 160 of the articles of association, it is difficult to see upon what principle it can possibly be brought within the common law rule. My conclusion is that this appeal fails, and I recommend to your Lordships that it be dismissed with costs.

[90] In *Re Famatina Development Corporation, Limited* [1914] 2 Ch 27 CA, the applicant (Mr O' Driscoll) was a member of the company. Article 143 of the company's articles of association provided that:

> Every director, trustee, auditor, solicitor, manager, secretary, and other officer and servant of the company shall be indemnified by the company against loss, and it shall be the duty of the directors, out of the funds of the company, to pay all damages, fines, cost, losses, and expenses, which any such officer or servant may incur or become liable to by reason of any contract entered into, or act or deed done by him as such officer or servant or by reason of any act of any of the officers, servants or employees of the company.

[91] The company was registered in 1902 for the purpose of acquiring from one of the promoters, who became the chairman and managing director of the company, certain mining properties and options in Argentina. The applicant was employed under a contract in writing by the company as consulting engineer to visit Argentina and to make inquiries into the value of these properties and options and report thereon to the company. As the result of his inquiries, the applicant reported that the managing director had made contracts for worthless properties, had made misleading reports, and had arranged for certain secret commissions.

[92] The managing director brought an action for libel and slander against the applicant, which after being carried to the House of Lords was ultimately dismissed with costs owing to the failure of the managing director to comply with an order for security for the costs of a new trial. The greater part of the applicant's costs proved irrecoverable, and he now sought to prove in the liquidation of the company for the amount of these costs. The liquidator rejected the proof. The applicant was a member of the company at the date of his employment, and article 143 of the company's articles of association provided that every officer or servant of the company should be indemnified by the company against loss, and that it should be the duty of the directors

A out of the funds of the company to pay all costs, losses, and expenses which he might incur by reason of any act done by him as such officer or servant. At first instance, Sargant J, held that on the evidence the reports in question were privileged and were made without malice, but, though it was the duty of the applicant to make the reports to the company, it did not fall within
B the direct terms of his employment so to do; and that the applicant was not entitled to any indemnity against the costs in question either under article 143, which constituted no contract between the company and the applicant, or under the common law. Mr Driscoll appealed to the Court of Appeal. His appeal was allowed. Lord Cozens-Hardy MR (p. 282) said:

C
> Mr. O'Driscoll was much more than a servant of the company and the duties imposed upon him were far wider than those of a consulting engineer. He was undoubtedly appointed to be the agent of the company for many purposes and all he had done was done in pursuance of his duties as agent. Therefore he came within the well settled rule that an agent had a right against his principal, founded upon an implied contract,
D to be indemnified against all losses and liabilities, and to be reimbursed all expenses incurred by him in the execution of his authority.

[93] As I said earlier, article 170 is very wide and unlike the cases referred to by both sides, namely, *Tomlinson v. Liquidators of Scottish Amalgamated Silks Ltd* [1935] SC (HL) and *Chee Kheong Mah ChaLy and Ors v. Liquidation*
E *of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR (R) 577 SGCA, the present plaintiffs as former directors of the company may claim an indemnity for legal costs/expenses for successfully defending themselves in any proceedings including an action by the company against its own directors for breach of trust/breach of duty as a director. It is important to emphasise that
F article 170 of the company's articles of association provides:

> Every director, managing director, agent, auditor, secretary, and other officer for the time being of the Company shall be indemnified out of the assets of the Company **against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given**
G **in his favour** or in which he is acquitted or in connection with any application under the Act in which relief is granted to him by the court in respect of any negligence, default breach of duty or breach of trust.
>
> (emphasis added)

[94] Having examined the relevant articles of association, it is my finding
H that cases such as *Tomlinson* and *Chee Kheong Mah Chaly* (where indemnity was declined) are cases which turned on the particular wording of the respective articles of association in those cases. The critical words in article 170 are the words, "defending any proceedings, whether civil or criminal, in which judgment is given in his favour ...".

I **[95]** It is important to keep in mind that the present plaintiffs are merely seeking an indemnity for all their legal expenses which they had to incur because of the spate of litigation which was launched by the company or on

its behalf and these litigation cases had everything to do with the conduct of the present plaintiffs *vis-a-vis* the disposal of the controlling block of shares in PEB which the company was seeking to impugn *via* the litigation actions. Whilst the present plaintiffs may not strictly be regarded as agents (per *Famatina*'s case), they nevertheless were not in any sense on a frolic of their own and at all times acted *qua* directors in disposing the controlling block of PEB shares. There was certainly a causal connection between the conduct of the present plaintiffs and their duties towards the company which therefore brings the litigation within the frame of article 170 which in my view is unambiguous and clear in its intention - that directors who are sued for any breach of their duties towards the company may later look to the company for indemnity and reimbursement of all legal expenses incurred in successfully defending themselves and being vindicated of all the nefarious allegations that were levelled against them. That in my view, is the severe financial risk that the company took when it launched the litigation against the present plaintiffs *via* the legal actions alluded to earlier.

[96] I turn next to the question of accrual of the cause of action for purposes of s. 289 CA 2016. In this regard, the question to be asked is when is the earliest point in time that the present plaintiffs could have filed an action for indemnity. The answer to my mind is 31 January 2017 - when the CA 2016 came into force and not at any earlier date.

[97] On 31 January 2017, there was no judgment by any court vindicating the plaintiffs of the alleged wrongdoings as the Court of Appeal had on 25 August 2015 set aside the High Court order dated 21 March 2014 which previously vindicated the present plaintiffs. For the purpose of s. 287 CA 2016, it is the judgment of the Federal Court on 14 December 2017 which is to be regarded as the "happening of an event" for the purposes of computation of time (see: judgment of Raja Azlan Shah (CJ Malaya) in *Kenderaan Bas Mara v. Yew Bon Tew & Anor* [1979] 1 LNS 38; [1980] 1 MLJ 311 at p. 313). It is of course tempting to suggest that the decision of the High Court in 2014 was the happening of the event. But I rather think that that would only have been the case if the company had accepted the High Court's decision and not appealed to the Court of Appeal which then paved the way for the relevant plaintiffs to take it up further to the Federal Court.

[98] By appealing to the Court of Appeal and in succeeding in setting aside the High Court order, the happening of the event vanished and the matter was set at large as the issue of vindication of the present plaintiffs was yet to be determined as a matter of finality in the apex court (Federal Court). Of course, had the present plaintiffs accepted the Court of Appeal's decision and did not take it up to the Federal Court, then that would have been the end of the matter. But they exercised their legal rights and obtained leave of the Federal Court and duly lodged appeals to the Federal Court, which ultimately agreed with the High Court and reversed the Court of Appeal's

decision. Hence, on 14 December 2017, the Federal Court reinstated the High Court order and thereby finally vindicated the present plaintiffs of all the alleged wrongdoings.

[99] By not accepting the correctness of the decision of the High Court, the company has kept the issue of vindication alive and extant and this was the position until the position was finally and conclusively cemented by the Federal Court on 14 December 2017. By that time, s. 289 CA 2016 had come into force and it gave them a statutory right to obtain an indemnity in respect of their legal costs incurred throughout the litigation proceedings. The claim here was filed on 7 August 2018, which is well after the coming into force of the CA 2016.

[100] Thus, for the several reasons as stated and discussed above, the present plaintiffs' claim is allowed, first, on the basis of article 170 of the company's article of association and secondly on the basis of s. 289 CA 2016.

Outcome

[101] As such, the following orders were granted:

(i) A declaration that the present plaintiffs are entitled to be indemnified out of the assets of the defendant against legal costs in the sum of RM304,500 incurred jointly by them in the Kuala Lumpur High Court Civil Suit No: D-22NCC-735-2009.

(ii) The sum of RM304,500 to be paid by the defendant to the plaintiffs within seven days from the date of this order.

(iii) A declaration that P1, P3 and P4 are entitled to be indemnified out of the assets of the defendant against legal costs as incurred jointly by them in relation to:

(a) the defendant's action in Kuala Lumpur High Court Civil Suit No. D-22NCC-1057-2011;

(b) the defendant's appeal in the Court of Appeal Civil Appeal No. W-02(NCC)(W)-736-04/2014;

(c) P1's application for leave to appeal in the Federal Court Civil Application No. 08-446-09/2015;

(d) P3's and P4's application for leave to appeal in the Federal Court Civil Application No. 08-443-09/2015;

(e) P1's appeal in the Federal Court Civil Appeal No. 02(f)-7-03/2016(W); and

(f) P3's and P4's appeal in the Federal Court Civil Appeal No. 02(f)-8-03/2016(W)

(iv) The sum of RM1,446,189.06 to be paid by the defendant to P1 within seven days from the date of this order;

(v) The sum of RM565,973.60 be paid by the defendant to P3 and P4 within seven days from the date of this order;

(vi) Costs of this OS in the sum RM322,869.68 to be borne by the defendant on a solicitor-client basis, subject to allocatur fee.

Order accordingly.